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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 25, and 52

[FAR Case 2019-016; Docket No. FAR-2019-0016, Sequence No.

1]

RIN 9000-AN99

**Federal Acquisition Regulation: Maximizing Use of
American-Made Goods, Products, and Materials**

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement an Executive order (E.O.) addressing domestic preferences in Government procurement.

DATES: Interested parties should submit written comments at the address shown below on or before **[Insert date 60 days after date of publication in the *FEDERAL REGISTER*]** to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2019-016 to <http://www.regulations.gov>. Submit comments via the

Federal eRulemaking portal by searching for "FAR Case 2019-016". Select the link "Comment Now" that corresponds with "FAR Case 2019-016." Follow the instructions provided on the screen. Please include your name, company name (if any), and "FAR Case 2019-016" on your attached document. If your comment cannot be submitted using

<https://www.regulations.gov>, call or email the points of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

Instructions: Please submit comments only and cite "FAR Case 2019-016" in all correspondence related to this case.

All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check

<https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: Ms. Zenaida Delgado, Procurement Analyst, at 202-969-7207 or zenaida.delgado@gsa.gov for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755 or GSAREgSec@gsa.gov. Please cite FAR Case 2019-016.

SUPPLEMENTARY INFORMATION:

I. Background

Congress passed the Buy American Act during the Great Depression to foster American industry by protecting it from foreign competition for Federal procurement contracts. The Buy American Act is codified at 41 U.S.C. Chapter 83 as the Buy American statute and provides pricing preferences to offerors who certify their compliance with the domestic purchasing requirements stated in the Act. Specifically, it requires public agencies to procure articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components, subject to exceptions for nonavailability of domestic products, unreasonable cost of domestic products, and when it would not be in the public interest to buy domestic products.

The key to understanding the Buy American statute, which is implemented in FAR part 25, is determining whether the solicited goods or "end products" or "construction material" are domestic, i.e. were mined, produced, or manufactured in the United States, substantially from components mined, produced, or manufactured in the United States. The analysis of whether a manufactured end product or construction material qualifies as domestic is done using a two-part test.

1. The end product or construction material must be manufactured in the United States.

2. More than 50 percent of all component parts (determined by cost of the components) must also be mined, produced, or manufactured in the United States.

The factor of 50 percent in the existing FAR definition came from E.O. 10582, Prescribing Uniform Procedures for Certain Determinations under the Buy American Act, available via the Internet at <https://www.archives.gov/federal-register/codification/executive-order/10582.html>. E.O. 10582 interpreted the statutory requirement that domestic products must be manufactured "substantially all" from domestic components as meaning in excess of 50 percent. If a product meets this two-part test, then it can be considered a "domestic end product" or "domestic construction material" under the Buy American statute. End products or construction material that do not qualify as domestic under this test are treated as foreign.

The Buy American statute is waived in situations where the United States has reciprocal trade agreements, including the World Trade Organization Government Procurement Agreement (WTO GPA). Generally, the dollar value of the acquisition determines which of the trade

agreements applies. Exceptions to the applicability of the trade agreements are described in FAR subpart 25.4. The FAR clauses implementing the Trade Agreements Act allow the Government to purchase end items that are "substantially transformed" in countries that are parties to such trade agreements without regard to the source or cost of the components. On acquisitions under the WTO GPA, end products that are "substantially transformed" in the United States are considered "U.S.-made end products" and they are not subject to the Buy American statute or E.O. 13881.

On July 15, 2019, the President signed E.O. 13881, Maximizing Use of American-Made Goods, Products, and Materials (84 FR 34257, July 18, 2019). This E.O. changes FAR clauses implementing the Buy American statute by increasing the—

1. Domestic content requirements; and
2. Price preference for domestic products.

Increased domestic content requirements

Under E.O. 13881, the domestic content requirement for iron and steel end products increases to 95 percent. For everything else, the domestic content requirement increases from 50 percent to exceeds 55 percent of the cost of all components. E.O. 13881 creates a new separate higher

domestic content standard for iron and steel end products. This distinction does not currently appear in the FAR clauses implementing the Buy American statute. But it has been around for many years in domestic preference requirements governing certain federal grant programs, such as the Federal Transit Administration's Buy America regulations applicable to grantees. DoD procurements are affected by the increased domestic content requirements of E.O. 13881; the changes will be implemented in the Defense Federal Acquisition Regulation Supplement (DFARS) through DFARS Case 2019-D045, Maximizing Use of American-Made Goods.

Increase preference for domestic offers

The Buy American statute does not prohibit the purchase of foreign end products or use of foreign construction material. Instead, it encourages the use of domestic end products and construction material by imposing a price preference for domestic end products and construction material. Under current Buy American regulations, large businesses receive a 6 percent price preference. Small businesses get a 12 percent price preference. For DoD procurements, the price preference for end products from both large and small businesses is 50 percent. The 6 percent price preference was originally

established by E.O. 10582, which permitted the head of an executive agency to determine that a greater differential is appropriate. In October 1958, the Assistant Secretary of Defense (Supply and Logistics) and the Assistant Secretary of State agreed that a differential of 12 percent would be used for offers from small business (see Armed Services Procurement Regulation (ASPR), 1955 edition, Revision 45, 20 April 1959, Case 58-99).

E.O. 13881 increases the price preference from 6 percent to 20 percent for large businesses and from 12 percent to 30 percent for small businesses. The E.O. does not impact the 50 percent preference for DoD procurements, because the DoD percentage exceeds the requirements of the E.O.

II. Discussion and Analysis

A. Applicability of the Executive Order 13881 to construction material.

Although the E.O. addresses only "end products" in section 2, the Councils have interpreted the term "end product" in the E.O. to include "construction material." The E.O. doesn't define the term end product, but in both the title and section 1, addresses maximizing the use of American-made goods, products, and materials, not just end products. Furthermore, section 3 of the E.O. states that it

will supersede section 2(a) of E.O. 10582, which addressed "materials," and has been interpreted in the FAR to cover both end products and construction materials. In addition, the policy relating to iron and steel products has primary impact on the acquisition of construction materials. The Recovery Act applied the restrictions on acquisition of domestic iron and steel products solely to construction materials (see FAR subpart 25.6). Not addressing construction material in this rule would be contrary to the goal of the E.O. to maximize the use of American-made products.

B. Definitions

1. This rule proposes to amend the definitions of "domestic construction material" and "domestic end product" at FAR 25.003 and in the applicable clauses at FAR 52.225-1, 52.225-3, 52.225-9, and 52.225-11, and references at FAR 52.212-3(f)(1) and (g)(1)(iii), 52.225-2(a), and 52.225-4(c), as well as the policy discussion of these definitions at FAR 25.001(c)(1), 25.101(a)(2), and 25.201(b), to include the new E.O. requirement that for "domestic construction material" or a "domestic end product" that does not consist wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 55 percent of the cost of all components.

2. A new paragraph is added in each definition to address end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both, respectively, to require that the cost of iron and steel not produced in the United States as estimated in good faith by the contractor, must constitute less than 5 percent of the cost of all components. This addition to the definitions was derived and integrated with existing FAR coverage as follows:

a. Iron and steel end product means an end product or construction material that consists wholly or predominantly of iron or steel or a combination of both.

b. Predominantly of iron or steel or a combination of both means the cost of the iron and steel content in an item that exceeds 50 percent of the total cost of all its components. Basing the predominance on cost, rather than weight, is consistent with the requirement of the E.O. that the foreign iron and steel content be limited to less than 5 percent of the cost of all components.

c. Foreign iron and steel means iron and steel not produced in the United States. This is consistent with the definition of "foreign iron and steel" under the Recovery Act (see FAR 25.602-1(a)(1)(ii)).

d. When addressing construction materials or end products that are wholly or predominantly iron or steel or a combination of both, it is unnecessary to address unmanufactured construction material or unmanufactured end products, respectively, because the Government does not buy unmanufactured iron and steel end products and construction materials.

e. "Produced in the United States" is taken from FAR subpart 25.6, and applies to the iron and steel in construction material and end products that consist wholly or predominantly of iron or steel or a combination of both.

f. The definition of "steel" is taken from FAR subpart 25.6.

g. Because of the difficulty of estimating the cost of all foreign iron and steel content, the rule proposes a good faith estimate by the contractor, with the exception of fasteners, which, as explained in section II.C., are defined and treated separately.

h. The requirement that components of unknown origin be treated as foreign has been incorporated into the definitions of "domestic end product" and "domestic construction material" for those items that do not consist wholly or predominantly of iron or steel or a combination of both. This requirement is comparable to the other

requirements already in the definition such as the treatment of domestically nonavailable components and scrap generated in the United States as domestic. This makes it clearer that this is only applicable to items that do not consist wholly or predominantly of iron or steel or a combination of both.

i. The rule revises the term "component test" to "domestic content test," which can apply to either the component content of other than iron or steel products test, or the iron and steel content of iron or steel products, as applicable. With regard to manufactured supplies and materials (whether end products or construction materials), the Buy American statute requires that in order to be considered domestic, such materials and supplies shall have been manufactured in the United States "substantially all from articles, materials, or supplies mined produced, or manufactured in the United States."

E.O. 10582 interpreted this requirement by stating that materials shall be considered to be of foreign origin if the cost of foreign products used in such materials constitutes 50 percent or more of the cost of all the products used in such materials. When incorporated into the FAR, the term "component" was substituted for the term "product" and this has been referred to as the "component

test". Although E.O. 13881 retains similar language with regard to end products other than iron and steel end products, just changing the percentage from 50 percent to 45 percent, E.O. 13881 does not reference the term "product" when referring to the cost of iron and steel used in iron and steel end products. It states that "the cost of foreign iron and steel used in such iron and steel end products constitutes 5 percent or more of the cost of all the products used in such iron and steel end products." Thus, the test for iron and steel is no longer a "component test" but a test of the cost of iron and steel content.

C. Partial reinstatement of the domestic content test of the Buy American statute for iron and steel products.

In 2009, the Administrator for Federal Procurement Policy waived what is now called the domestic content test (previously called the component test) for commercially available off-the-shelf (COTS) items based on a determination made pursuant to 41 U.S.C. 1907. See FAR Case 2000-305, January 15, 2009, 74 FR 2713. Furtherance of the Buy American statute was driven by retention of the requirement that the product must still be manufactured in the United States.

The proposed rule would partially restore the domestic content test for COTS items as it pertains to iron and

steel products. The bulk of iron and steel products acquired by the Government are primarily COTS items, used as construction material. Roll-back of the waiver is necessary to give full effect to the E.O.'s requirement that domestic iron and steel products shall not contain more than 5 percent foreign iron and steel.

At the same time, the proposed rule would continue to waive the domestic content test for iron and steel fasteners. Fastener is defined as a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws. Fasteners are generally so small, inexpensive and comingled that trying to keep track of the origin of all fasteners would create an administrative burden that would outweigh any benefit to the American iron and steel industrial base. The proposed partial reinstatement of the domestic content test for products that consist wholly or predominantly of iron or steel or a combination of both would require changes to the list of inapplicable laws at FAR 12.505(a), the definitions of "domestic construction material" and "domestic end product," and various other conforming changes wherever waiver of the now domestic content test is mentioned (FAR 25.001(c) (1), 25.100(a) (4), 25.101(a) (2), 25.200(a) (4),

25.201(b)(2), 52.225-1(b), 52.225-3(c), 52.225-9(b), and 52.225-11(b)).

D. Evaluation factor for determination of unreasonable cost.

The new E.O. also increases the evaluation factors to be applied to offers of foreign end products or construction material when determining whether the cost of offered domestic end products or construction material is unreasonable. For acquisitions of end products, the factor of 20 percent is to be applied to a foreign offer if the potential domestic awardee is other than a small business, and a 30 percent factor is to be applied if the potential awardee would be a small business (see FAR 25.105(b), 25.204, 25.502(c), 25.604, 25.605, 52.225-9(b)(3)(i), 52.225-11((b)(4)(i), and the Recovery Act clauses at 52.225-21 through 52.225-24). Consistent with current FAR coverage for acquisitions of foreign construction material under a construction contract, the higher preference for small businesses is inapplicable, because under a construction contract, there are not separately identifiable offers on each item of construction material, but it is part of an overall bid on the project. The foreign material is evaluated on the basis of market

research, not a specific competing offer. Thus, only the 20 percent factor would be applied to construction material.

E. Applicability to acquisitions funded by the Recovery Act.

Projects funded with monies from section 1605 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) (Pub. L. 111-5) are subject to more stringent requirements for use of domestic manufactured construction material, particularly iron and steel (see FAR subpart 25.6). The Recovery Act restrictions apply only to construction projects using funds appropriated under that Act. Most of those funds have now been obligated and expended, and there is very little continued applicability of these regulations.

The Recovery Act does not apply to unmanufactured construction material, which is therefore still covered by the Buy American statute. The increased requirements of the new E.O. for domestic content for manufactured construction material are therefore inapplicable to acquisitions under the Recovery Act.

However, the 20 percent factor that applies to construction contracts covered by the Buy American statute, only applies to the unmanufactured construction material of a construction contract otherwise covered by the Recovery

Act. Accordingly, the 6 percent factor is revised to 20 percent at FAR 25.604(c)(2) and 25.605 and in the following Recovery Act provisions and clause:

52.225-21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials.

52.225-22, Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials.

52.225-23, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements.

52.225-24, Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Statute—Construction Materials Under Trade Agreements.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-shelf (COTS) Items

This proposed rule does not add any new provisions or clauses, nor change the applicability of existing provisions or clauses to contracts at or below the SAT and contracts for the acquisition of commercial items, including COTS items.

However, this rule does propose to apply the domestic content test of the Buy American statute, as implemented by E.O. 13881, to COTS items that consist wholly or predominantly of iron and steel (excluding fasteners). In accordance with 41 U.S.C. 1907, since 2008, the domestic content test of the Buy American statute has been waived for COTS items, in part due to the complexity and cost of keeping track of components in a world of global sourcing where the Government is not a market driver. However, the domestic content test for the iron and steel items does not require tracking of all components, only a good faith assurance that not more than 5 percent of the iron and steel content is foreign. In addition, absent restoration of the domestic content test, the E.O. 13881 requirement with regard to iron and steel construction material would have very little effect.

As explained above, the domestic content waiver for COTS items would continue to apply to iron and steel fasteners, such as nuts, bolts, pins, rivets, nails, clips, and screws, which are generally so small, inexpensive and comingled that trying to keep track of the origin of all fasteners would create an administrative burden that would outweigh any benefit to the American iron and steel industrial base.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Expected Impact of the Proposed Rule

The current FAR clauses implementing the Buy American statute apply to a narrow set of procurements. Also, because the FAR Council is leaving the COTS items exception in place for most COTS items, the heightened domestic content requirements will not be applicable to those procurements.

When this rule is implemented, domestic industries supplying domestic end products are likely to benefit from a competitive advantage. Based on the E.O., it is unclear

if the pool of qualified suppliers would be reduced, resulting in less competition (and a possible increase in prices that the Government will pay to procure these products).

At least three arguments point to the possibility that any increased burden, on contractors in particular, could be small if not de minimis: (1) familiarization costs should be low, (2) some, if not many, contractors may already be able to meet the more stringent threshold, and (3) costs incurred by contractors who adjust their supply chains so that their end products qualify as domestic will enjoy a larger price preference that should help to offset these costs over time. Each of these arguments is explained below.

First, DoD, GSA, and NASA do not anticipate significant cost from contractor familiarization with the rule given the history of rulemaking and E.O.s in this area. The basic mechanics of the Buy American statute (e.g., definitions, how and when the price preference is used to favor domestic end products, certifications required of offerors to demonstrate end products are domestic) remain unchanged and continue to reflect processes that are decades old.

Second, some, if not many, contractors may already be able to comply with the lower foreign content requirement needed to meet the definition of domestic end product under E.O. 13881 and the proposed rule. Laws such as the SECURE Technology Act, Pub. L. 115-390, which requires a series of actions to strengthen the Federal infrastructure for managing supply chain risks, are placing significantly increased emphasis on Federal agencies and Federal Government contractors to identify and reduce risk in their supply chains. One way to reduce supply chain risk is to increase domestic sourcing of content. In addition, in the context of iron and steel, many laws already in place call for more stringent content. For example, the Recovery Act required that all construction material for a project for the construction, alteration, maintenance, or repair of a public building or a public work in the United States, consisting wholly or predominantly of iron or steel, had to be produced in the United States when using Recovery Act funds, to the extent consistent with trade agreements (see FAR 25.602-1, implementing section 1605 of the Recovery Act). In addition, Federal contractors who also work on contracts funded under Federal grants may, in some cases, find that the steel, iron, and manufactured goods used in the project be produced in the United States, as is the

case for certain funding administered by the Federal Transit Administration for public transportation projects (see 49 U.S.C. 5323(j)). Accordingly, it is possible that the Federal market for iron and steel has already done significant retooling and could meet the requirements of E.O. 13881 without too much additional effort.

Third, it is anticipated that some contractors' products and construction materials may not meet the definition of domestic end product and construction material unless the contractors take steps to adjust their supply chains to increase the domestic content. Those contractors that make a business decision not to modify their supply chains will still be able to bid on Federal contracts but will no longer enjoy a price preference. Those contractors that sell to civilian agencies and retool their supply sources to meet the more stringent threshold will have a more generous price preference applied to their products - i.e., 20 percent generally under the new rule vs. 6 percent under the current rule; 30 percent if the seller is a small business vs. 12 percent under the current rule. These stronger preferences, which are designed as an incentive to encourage more domestic sourcing, may help to offset costs of meeting the new standards.

This rule has the potential to slightly increase the estimated percentage of foreign offers. It can only impact products that are made in the United States as follows: iron or steel that has a content of 5 percent or more of foreign iron or steel; or other products, other than COTS items, that have a content of 45 to 50 percent foreign components. Offerors of such products have an option to increase the domestic content and continue to offer domestic products, in which case they may benefit from the increased preference for domestic products, or they may choose to continue to offer the same product, which will now be evaluated as foreign. We do not have any data on how many currently domestic products would fall into this category. Nor do we have any knowledge as to which option an offeror of such products would select. With regard to the increased price preference for domestic offers, we note that robust competition among vendors offering domestic products will decrease the extent to which the Government could pay an additional 20 to 30 percent for domestic products above and beyond the cost of otherwise equivalent foreign products.

DoD, GSA, and NASA do not expect a significant cost impact on the public but lack data to make a definitive determination and seek information from the public to

assist with this analysis. Feedback is requested on the following questions:

(1) What industry do you represent? Are you a manufacturer or a reseller?

(2) For manufacturers and resellers of end products other than iron and steel-

(a) Do you currently meet the higher standards specified in the proposed rule for a domestic end product or construction material or would you have to make adjustments to your supply chain to meet the new requirements?

(b) If you would have to make adjustments to your supply chain in response to changes proposed here, do you plan to do so?

(c) If the answer to question (b) is yes, how much do you think it will cost to make these changes, and to what extent do you believe this cost will be offset by the increased preference applicable to purchases by civilian agencies if you move toward products with higher domestic content?

(3) For sellers of iron and steel, what, if any, adjustments do you anticipate having to make to your supply chain to meet the new requirements, and how much do acquisition costs vary between iron and steel with less or

equal than 95 percent domestic content, and greater than 95 percent domestic content?

(4) Section 4 of E.O. 13881 directed consideration of the "feasibility and desirability" of further decreases in the threshold percentage of foreign content allowed for an end product other than iron or steel to be considered domestic from the 45 percent proposed in this rule to 25 percent. Accordingly, DoD, GSA, and NASA encourage manufacturers and resellers of end products other than iron and steel to provide input on the feasibility and desirability of adopting this more stringent standard by addressing the following -

(a) Could you currently meet a 25 percent foreign content requirement for domestic end products or construction material or would you have to make adjustments to your supply chain to do so?

(b) If you would have to make adjustments to your supply chain to meet a 25 percent requirement, would you do so?

(c) If the answer to question (b) is yes, how much do you think it would cost to come into compliance, how much would acquisition costs for these materials rise, and to what extent do you believe this

cost would be offset by the increased preference applicable to purchases by civilian agencies?

(d) Do you think it is preferable to work towards a 25 percent threshold incrementally? If so, why and what incremental change would you propose over what period of time?

VI. Executive Order 13771

DoD, GSA, and NASA do not expect this to be considered a regulatory action under E.O. 13771, Reducing Regulation and Controlling Regulatory Costs, because this rule is expected to have a de minimis burden impact on the public (see section V of this preamble).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule does not impose new requirements just changes to the existing percentages. This rule proposes to make adjustments to the required percentage of domestic content and the existing percentages for the price evaluation preferences in an effort to decrease the amount of foreign-sourced content in a U.S. manufactured product to promote economic and national security, help stimulate economic

growth, and create jobs.

Nevertheless, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and summarized as follows:

This case amends the FAR to implement an Executive order regarding maximizing the use of American-made goods, products, and materials.

The objective of this proposed rule is to strengthen domestic preferences under the Buy American statute, as required by E.O. 13881, by changing how a domestic product is defined and how the price of a domestic product is determined to be unreasonable.

In accordance with Federal Procurement Data System data for fiscal years (FY) 2017, 2018, and 2019 for new awards with foreign place of performance for construction valued over the micro-purchase threshold and awards for supplies to unique small businesses; this rule will apply to only the 8 percent of foreign construction awards which were made to small businesses and, only 14 percent of foreign supply awards were made to small businesses.

Buy American Statute	FY 2017	FY 2018	FY 2019	Median
	SB/Total	SB/Total	SB/Total	SB %
Construction	18/217 = 8%	13/223 = 6%	15/199 = 8%	8%
Supplies	153/1,200 = 13%	164/1,161 = 14%	164/1,048 = 16%	14%

This rule is covered under the existing information collection requirements associated with the Buy American statute. The rule will strengthen domestic preferences under the Buy American statute and provide small businesses the opportunity and incentive to deliver U.S. manufactured products from domestic suppliers. It is expected that this rule will benefit U.S. small business manufacturers, including those of iron or steel.

This rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD, GSA, and NASA were unable to identify any significant alternatives.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be

obtained for the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2019-016), in correspondence.

VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under the Office of Management and Budget Control Number 9000-0024, Buy American, Trade Agreements, and Duty-Free Entry- FAR Sections Affected: 52.225-2; 52.225-4, 52.225-6, 52.225-8 thru 52.225-12, and 52.225-21 & 52.225-23.

List of Subjects in 48 CFR Parts 12, 25, and 52

Government procurement.

William F. Clark,
Director,
Office of Government-wide

Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 12, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 25, and 52 continues to read as follows:

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. Amend section 12.505 by revising paragraph (a) to read as follows:

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

* * * * *

(a)(1) The portion of 41 U.S.C. 8302, American Materials Required for Public Use, paragraph (a)(1) that reads “substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States,” Buy American—Supplies, domestic content test, except as provided in 25.101(a)(2)(ii) (see 52.225-1 and 52.225-3).

(2) The portion of 41 U.S.C. 8303, Contracts for Public Works, paragraph (a)(2) that reads “substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States,” Buy American—

Construction Materials, domestic content test, except as provided in 25.201(b) (2) (ii) (see 52.225-9 and 52.225-11).

* * * * *

PART 25—FOREIGN ACQUISITION

3. Amend section 25.001 by revising paragraph (c) (1) to read as follows:

25.001 General.

* * * * *

(c) * * *

(1) The Buy American statute uses a two-part test to define a "domestic end product" or "domestic construction material" (manufactured in the United States and a domestic content test). The domestic content test has been waived for acquisition of commercially available off-the-shelf items, except a product that consists wholly or predominantly of iron or steel or a combination of both (excluding fasteners) (see 25.101(a) and 25.201(b)).

* * * * *

4. Amend section 25.003 by—

a. Revising the definitions "Domestic construction material" and "Domestic end product"; and

b. Adding in alphabetical order the definitions "Fastener", "Predominantly of iron or steel or a combination of both", and "Steel".

The revisions and additions read as follows:

25.003 Definitions.

* * * * *

Domestic construction material means—

(1) For use in subparts other than 25.6—

(i) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(A) An unmanufactured construction material mined or produced in the United States; or

(B) A construction material manufactured in the United States, if—

(1) The cost of the components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(2) The construction material is a COTS item; or

(ii) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States

if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); or

(2) For use in subpart 25.6, see the definition in 25.601.

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic.

Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives).

* * * * *

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

* * * * *

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content in

an item exceeds 50 percent of the total cost of all its components.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

* * * * *

5. Amend section 25.100 by—

- a. Removing from the end of paragraph (a) (2) “and”;
- b. Redesignating paragraph (a) (3) as paragraph (a) (4);
- c. Adding a new paragraph (a) (3); and
- d. Revising the newly redesignated paragraph (a) (4).

The addition and revision read as follows:

25.100 Scope of subpart.

(a) * * *

(3) Executive Order 13881, July 15, 2019; and

(4) Waiver of the domestic content test of the Buy American statute for acquisition of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.101(a) (2) (ii).

* * * * *

6. Amend section 25.101 by—

a. Removing from paragraph (a) introductory text "statute uses" and adding "statute and E.O. 13881 use" in its place;

b. Revising paragraph (a)(2);

c. Removing from paragraph (b) "component test" and adding "domestic content test" in its place; and

d. Removing from paragraph (c) "Subpart 25.5" and adding "subpart 25.5" in its place.

The revision reads as follows:

25.101 General.

(a) * * *

(2)(i) Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 55 percent of the cost of all the components. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (see 12.505(a)) (but see paragraph (a)(2)(ii) of this section).

(ii) For an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, must constitute less than 5 percent of the

cost of all the components used in the end product. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for fasteners.

* * * * *

25.105 [Amended]

7. Amend section 25.105 by—

a. Removing from paragraph (b)(1) “6 percent” and adding “20 percent” in its place; and

b. Removing from paragraph (b)(2) “12 percent” and “Subpart 19.5” and adding “30 percent” and “subpart 19.5” in their places, respectively.

8. Amend section 25.200 by—

a. Removing from the end of paragraph (a)(2) “and”;

b. Redesignating paragraph (a)(3) as paragraph (a)(4);

c. Adding a new paragraph (a)(3); and

d. Revising the newly redesignated paragraph (a)(4).

The addition and revision read as follows:

25.200 Scope of subpart.

(a) * * *

(3) Executive Order 13881, July 15, 2019; and

(4) Waiver of the domestic content test of the Buy American statute for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.201(b)(2)(ii).

* * * * *

9. Revise section 25.201 to read as follows:

25.201 Policy.

(a) Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

(b) The Buy American statute restricts the purchase of construction materials that are not domestic construction materials. For manufactured construction materials, the Buy American statute and E.O. 13881 use a two-part test to define domestic construction materials.

(1) The article must be manufactured in the United States; and

(2)(i) Except for construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 55 percent of the cost of all the components. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (see 12.505(a)).

(ii) For construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, must constitute less than 5 percent of the cost of all the components used in such construction material. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for fasteners.

25.204 [Amended]

10. Amend section 25.204 in paragraph (b) by removing "6 percent" and adding "20 percent" in its place.

11. Amend section 25.504-1 by—

- a. Revising the table in paragraph (a) (1);
- b. Removing from paragraph (a) (2) "12 percent" and "\$11,200" and adding "30 percent" and "\$13,000" in their places, respectively; and
- c. Removing from paragraph (b) (2) "12 percent" and "\$11,424" and adding "30 percent" and "\$13,260" in their places, respectively.

The revision reads as follows:

25.504-1 Buy American statute.

(a) (1) * * *

Offer A	\$16,000	Domestic end product, small business.
Offer B	\$15,700	Domestic end product, small business.
Offer C	\$10,000	U.S.-made end product (not domestic), small business.

* * * * *

12. Amend section 25.504-2 by revising the table to read as follows:

25.504-2 WTO GPA/Caribbean Basin Trade Initiative/FTAs.

* * * * *

Offer A	\$304,000	U.S.-made end product (not domestic).
Offer B	\$303,000	U.S.-made end product (domestic), small business.
Offer C	\$300,000	Eligible product.

Offer D	\$295,000	Noneligible product (not U.S.- made) .
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* * * * *

13. Amend section 25.504-3 by—

a. Revising the entry “Offer B” in the table in paragraph (a);

b. Revising the entry “Offer B” in the table in paragraph (b); and

c. Revising entries “Offer B” and “Offer C” in the table in paragraph (c).

The revisions read as follows:

25.504-3 FTA/Israeli Trade Act.

(a) * * *

* * * * *		
Offer B	\$100,000	Eligible product.

* * * * *

(b) * * *

* * * * *		
Offer B	\$103,000	Noneligible product.

* * * * *

(c) * * *

* * * * *		
Offer B	\$103,000	Eligible product.
Offer C	\$100,000	Noneligible product.

* * * * *

14. Amend section 25.504-4 by—

a. In paragraph (a)—

i. Revising the table;

ii. In STEP 1, Items 3 and 5, removing “6 percent” and adding “20 percent” in their places, respectively; and

iii. Revising STEP 2 and 3.

b. Revising paragraph (b).

The revisions read as follows:

25.504-4 Group award basis.

(a) * * *

Item	Offers		
	A	B	C
1	DO = \$55,000	EL = \$56,000	NEL = \$50,000
2	NEL = \$13,000	EL = \$10,000	EL = \$13,000
3	NEL = \$11,500	DO = \$12,000	DO = \$10,000
4	NEL = \$24,000	EL = \$28,000	NEL = \$22,000
5	DO = \$18,000	NEL = \$10,000	DO = \$14,000
Total	\$121,500	\$116,000	\$109,000

* * * * *

STEP 2: Evaluate Offer C against the tentative award pattern for Offers A and B:

Item	Offers		
	Low offer	Tentative award pattern from A and B	C
1	A	DO = \$55,000	*NEL = \$60,000
2	B	EL = \$10,000	EL = \$13,000
3	B	DO = \$12,000	DO = \$10,000
4	A	NEL = \$24,000	NEL = \$22,000
5	B	*NEL = \$12,000	DO = \$14,000
Total		\$113,000	\$119,000

*Offer + 20 percent.

On a line item basis, apply a factor to any noneligible offer if the other offer for that line item is domestic.

For Item 1, apply a factor to Offer C because Offer A is domestic and the acquisition was not covered by the WTO GPA. The evaluated price of Offer C, Item 1, becomes \$60,000 (\$50,000 plus 20 percent). Apply a factor to Offer B, Item 5, because it is a noneligible product and Offer C is domestic. The evaluated price of Offer B is \$12,000 (\$10,000 plus 20 percent). Evaluate the remaining items without applying a factor.

STEP 3: The tentative unrestricted award pattern from Offers A and B is lower than the evaluated price of Offer C. Award the combination of Offers A and B. Note that if

Offer C had not specified all-or-none award, award would be made on Offer C for line items 3 and 4, totaling an award of \$32,000.

(b) *Example 2.*

Item	Offers		
	A	B	C
1	DO = \$50,000	EL = \$50,500	NEL = \$50,000
2	NEL = \$10,300	NEL = \$10,000	EL = \$10,200
3	EL = \$20,400	EL = \$21,000	NEL = \$20,200
4	DO = \$10,500	DO = \$10,300	DO = \$10,400
Total	\$91,200	\$91,800	\$90,800

Problem: The solicitation specifies award on a group basis. Assume the Buy American statute applies and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

Analysis: (see 25.503(c))

STEP 1: Determine which of the offers are domestic (see 25.503(c)(1)):

	Domestic [percent]	Determination
--	--------------------	---------------

A	$\$50,000 \text{ (Offer A1)} + \$10,500 \text{ (Offer A4)} = \$60,500.$ $\$60,500 / \$91,200 \text{ (Offer A Total)} = 66.3\%$	Domestic
B	$\$10,300 \text{ (Offer B4)} / \$91,800 \text{ (Offer B Total)}$ $= 11.2\%$	Foreign
C	$\$10,400 \text{ (Offer C4)} / \$90,800 \text{ (Offer C Total)}$ $= 11.5\%$	Foreign

STEP 2: Determine whether foreign offers are eligible or noneligible offers (see 25.503(c)(2)):

	Domestic + eligible [percent]	Determination
A	N/A (Both Domestic)	Domestic
B	$\$50,500 \text{ (Offer B1)} + \$21,000 \text{ (Offer B3)} + \$10,300 \text{ (Offer B4)} = \$81,800.$ $\$81,800 / \$91,800 \text{ (Offer B Total)} = 89.1\%$	Eligible
C	$\$10,200 \text{ (Offer C2)} + \$10,400 \text{ (Offer C4)} = \$20,600.$ $\$20,600 / \$90,800 \text{ (Offer C Total)} = 22.7\%$	Noneligible

STEP 3: Determine whether to apply an evaluation factor (see 25.503(c)(3)). The low offer (Offer C) is a foreign offer. There is no eligible offer lower than the domestic offer. Therefore, apply the factor to the low

offer. Addition of the 20 percent factor (use 30 percent if Offer A is a small business) to Offer C yields an evaluated price of \$108,960 (\$90,800 + 20 percent). Award on Offer A (see 25.502(c)(4)(ii)). Note that, if Offer A were greater than Offer B, an evaluation factor would not be applied, and award would be on Offer C (see 25.502(c)(3)).

25.601 [Amended]

15. Amend section 25.601 by removing the definition "Steel".

25.604 [Amended]

16. Amend section 25.604 in paragraph (c)(2) by removing "6 percent" and adding "20 percent" in its place.

25.605 [Amended]

17. Amend section 25.605 by—

- a. Removing from paragraph (a)(2) "6 percent" and adding "20 percent" in its place; and
- b. Removing from paragraph (a)(3) ".06" and adding ".20" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

18. Amend section 52.212-3 by—

- a. Revising the date of the provision; and
- b. Revising paragraphs (f)(1), (g)(1)(i), the first sentence of (g)(1)(ii), and (g)(1)(iii) introductory text.

The revisions read as follows:

**52.212-3 Offeror Representations and Certifications—
Commercial Items.**

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS **(DATE)**

* * * * *

(f) * * *

(1) (i) The Offeror certifies that each end product, except those listed in paragraph (f) (2) of this provision, is a domestic end product.

(ii) The Offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(iii) The terms "domestic end product," "end product," "foreign end product," and "United States" are defined in the clause of this solicitation entitled "Buy American-Supplies."

* * * * *

(g) (1) * * *

(i) (A) The Offeror certifies that each end product, except those listed in paragraph (g) (1) (ii) or (iii) of this provision, is a domestic end product.

(B) The terms "Bahrainian, Moroccan, Omani, Panamanian, or Peruvian end product," "domestic end product," "end product," "foreign end product," "Free Trade

Agreement country," "Free Trade Agreement country end product," "Israeli end product," and "United States" are defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act."

(ii) The Offeror certifies that the following supplies are Free Trade Agreement country end products (other than Bahrainian, Moroccan, Omani, Panamanian, or Peruvian end products) or Israeli end products as defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act."

* * * * *

(iii) The Offeror shall list those supplies that are foreign end products (other than those listed in paragraph (g)(1)(ii) of this provision) as defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act." The Offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

* * * * *

19. Amend section 52.212-5 by-

a. Revising the date of the clause; and

b. Removing from paragraphs (b) (48) and (b) (49) (i) through (iv) "(MAY 2014)" and adding "(DATE)" in their places, respectively.

The revision reads as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items.

* * * * *

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE
ORDERS—COMMERCIAL ITEMS (DATE)

* * * * *

20. Amend section 52.213-4 by—

a. Revising the date of the clause; and

b. Removing from paragraph (b) (1) (xvii) introductory text "(MAY 2014)" and adding "(DATE)" in its place.

The revision reads as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *

TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL
ITEMS) (DATE)

* * * * *

21. Amend section 52.225-1 by—

a. Revising the date of the clause;

b. In paragraph (a):

i. Revising the definition "Domestic end product"; and

ii. Adding in alphabetical order the definitions "Fastener" and "Steel"; and

c. Revising paragraph (b).

The revisions and additions read as follows:

52.225-1 Buy American-Supplies.

* * * * *

BUY AMERICAN-SUPPLIES (DATE)

(a) * * *

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities

of a satisfactory quality are treated as domestic.

Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives).

* * * * *

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

* * * * *

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

* * * * *

(b) 41 U.S.C. chapter 83, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding fasteners.

* * * * *

22. Amend section 52.225-2 by revising the date of the provision and paragraph (a) to read as follows:

52.225-2 Buy American Certificate.

* * * * *

BUY AMERICAN CERTIFICATE (**DATE**)

(a)(1) The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product.

(2) The Offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(3) The terms "domestic end product," "end product," and "foreign end product" are defined in the clause of this solicitation entitled "Buy American—Supplies."

* * * * *

23. Amend section 52.225-3 by—

- a. Revising the date of the clause;
- b. In paragraph (a):
 - i. Revising the definition "Domestic end product"; and
 - ii. Adding in alphabetical order the definitions "Fastener" and "Steel";
- c. Revising the second sentence of paragraph (c);
- d. Revising the date in the introductory text and the second sentence of paragraph (c) of Alternate I;
- e. Revising the date in the introductory text and the second sentence of paragraph (c) of Alternate II; and
- f. Revising the date in the introductory text and the second sentence of paragraph (c) of Alternate III.

The revisions and additions read as follows:

52.225-3 Buy American—Free Trade Agreements—Israeli Trade Act.

* * * * *

BUY AMERICAN—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (**DATE**)

(a) * * *

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States;

(ii) An end product manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic.

Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost

of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all the components used in the end product (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives).

* * * * *

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

* * * * *

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

* * * * *

(c) * * * In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and

steel content of the end product, excluding fasteners. *

* *

Alternate I (DATE). * * *

(c) * * * In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding fasteners. * *

*

Alternate II (DATE). * * *

(c) * * * In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)), except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding fasteners. * *

*

Alternate III (DATE). * * *

(c) * * * In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item (see 12.505(a)(1)),

except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end product, excluding fasteners. * *

*

24. Amend section 52.225-4 by—

- a. Revising the date of the provision;
- b. Revising paragraph (a);
- c. In paragraph (b) introductory text removing “offeror” and adding “Offeror” in its place;
- d. Revising the first and second sentences of paragraph (c);
- e. In Alternate I by—
 - i. Revising the date of the Alternate; and
 - ii. Removing from paragraph (b) introductory text “offeror” and adding “Offeror” in its place;
- f. In Alternate II by—
 - i. Revising the date of the Alternate; and
 - ii. Removing from paragraph (b) introductory text “offeror” and adding “Offeror” in its place; and
- g. In Alternate III by—
 - i. Revising the date of the Alternate; and
 - ii. Removing from paragraph (b) introductory text “offeror” and adding “Offeror” in its place.

The revisions read as follows:

52.225-4 Buy American-Free Trade Agreements-Israeli Trade Act Certificate.

* * * * *

BUY AMERICAN-FREE TRADE AGREEMENTS-ISRAELI TRADE ACT CERTIFICATE **(DATE)**

(a) (1) The Offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product.

(2) The terms "Bahrainian, Moroccan, Omani, Panamanian, or Peruvian end product," "domestic end product," "end product," "foreign end product," "Free Trade Agreement country," "Free Trade Agreement country end product," "Israeli end product," and "United States" are defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act."

* * * * *

(c) The Offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled "Buy American-Free Trade Agreements-Israeli Trade Act." The Offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

* * * * *

*Alternate I (DATE) . * * **

*Alternate II (DATE) . * * **

*Alternate III (DATE) . * * **

25. Amend section 52.225-9 by—

a. Revising the date of the clause;

b. In paragraph (a):

i. Revising the definition “Domestic construction material”; and

ii. Adding in alphabetical order the definitions “Fastener” and “Steel”;

c. Revising paragraph (b) (1); and

d. Removing from paragraph (b) (3) (i) “6 percent” and adding “20 percent” in its place.

The revisions and additions read as follows:

52.225-9 Buy American—Construction Materials.

* * * * *

BUY AMERICAN—CONSTRUCTION MATERIALS (DATE)

(a) * * *

Domestic construction material means—

(1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured construction material mined or produced in the United States; or

(ii) A construction material manufactured in the United States, if—

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item.

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives).

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

* * * * *

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

* * * * *

(b) * * * (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction materials, excluding fasteners. (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

* * * * *

26. Amend section 52.225-11 by-

- a. Revising the date of the clause;
- b. In paragraph (a):

- i. Revising the definition "Domestic construction material"; and

ii. Adding in alphabetical order the definitions
"Fastener" and "Steel";

c. Revising paragraph (b) (1);

d. Removing from paragraph (b) (4) (i) "6 percent"
and adding "20 percent" in its place; and

e. In Alternate I—

i. Revising the date of the Alternate; and

ii. Revising paragraph (b) (1).

The revisions and additions read as follows:

**52.225-11 Buy American—Construction Materials Under Trade
Agreements.**

* * * * *

BUY AMERICAN—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (DATE)

(a) * * *

Domestic construction material means—

(1) For construction material that does not consist
wholly or predominantly of iron or steel or a combination
of both—

(i) An unmanufactured construction material mined or
produced in the United States; or

(ii) A construction material manufactured in the
United States, if—

(A) The cost of its components mined, produced,
or manufactured in the United States exceeds 55 percent of

the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

Components of unknown origin are treated as foreign; or

(B) The construction material is a COTS item;

(2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of iron and steel not produced in the United States (excluding fasteners) as estimated in good faith by the contractor, constitutes less than 5 percent of the cost of all components used in such construction material (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives).

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

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Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

* * * * *

(b) * * * (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction material, excluding fasteners. (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American restrictions are waived for designated country construction materials.

* * * * *

Alternate I (**DATE**). * * *

(b) * * * (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination

of both, the domestic content test is applied only to the iron and steel content of the construction material, excluding fasteners. (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, NAFTA, and the Oman FTA apply to this acquisition. Therefore, the Buy American statute restrictions are waived for designated country construction materials other than Bahrainian, Mexican, or Omani construction materials.

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27. Amend section 52.225-21 by-

- a. Revising the date of the clause;
- b. Removing from paragraph (b)(4)(i)(B) "6 percent" and adding "20 percent" in its place;
- c. Removing from paragraph (c) heading "*Section*" and adding "*section*" in its place; and
- d. In paragraph (d):
 - i. Removing from the first undesignated paragraph following the table "reponse" and adding "response" in its place; and
 - ii. Removing from the second undesignated paragraph following the table "**Include*" and adding "*[*Include*" in its place.

The revision reads as follows:

**52.225-21 Required Use of American Iron, Steel, and
Manufactured Goods—Buy American Statute—Construction
Materials.**

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REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—BUY

AMERICAN STATUTE—CONSTRUCTION MATERIALS **(DATE)**

* * * * *

28. Amend section 52.225-22 by—

- a. Revising the date of the provision;
- b. Removing from paragraph (b) “offeror” and adding “Offeror” in its place wherever it appears;
- c. Removing from paragraph (c) (1) (ii) “6 percent” and adding “20 percent” in its place;
- d. Removing from paragraph (c) (3) “offeror” and adding “Offeror” in its place; and
- e. Removing from paragraphs (d) (1), (2), and (3) introductory text “offeror” and adding “Offeror” in their places, respectively.

The revision reads as follows:

**52.225-22 Notice of Required Use of American Iron, Steel,
and Manufactured Goods—Buy American Statute—Construction
Materials.**

* * * * *

NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—

BUY AMERICAN STATUTE—CONSTRUCTION MATERIALS (DATE)

* * * * *

29. Amend section 52.225-23 by—

a. Revising the date of the clause; and

b. Removing from paragraph (b) (4) (i) (B) “6 percent” and adding “20 percent” in its place.

The revision reads as follows:

**52.225-23 Required Use of American Iron, Steel, and
Manufactured Goods—Buy American Statute—Construction
Materials Under Trade Agreements.**

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REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—BUY

AMERICAN STATUTE—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (DATE)

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30. Amend section 52.225-24 by—

a. Revising the date of the provision;

b. Removing from paragraph (b) “offeror” and adding “Offeror” in its place wherever it appears;

c. Removing from paragraph (c) (1) (ii) “6 percent” and adding “20 percent” in its place;

d. Removing from paragraph (c) (3) “offeror” and adding “Offeror” in its place; and

e. Removing from paragraphs (d) (1), (2), and (3) introductory text "offeror" and adding "Offeror" in their places, respectively.

The revision reads as follows:

**52.225-24 Notice of Required Use of American Iron, Steel,
and Manufactured Goods—Buy American Statute—Construction
Materials Under Trade Agreements.**

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NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND MANUFACTURED GOODS—

BUY AMERICAN STATUTE—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS

(DATE)

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